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7 UNITED STATES OF AMERICA
8 NATIONAL LABOR RELATIONS BOARD
9 REGION 20

10 STEVENS CREEK CHRYSLER JEEP) Case No. 20-CA-33367, et al.
11 DODGE, INC.)
12 Employer,) CHARGING PARTY'S BRIEF IN
13 v.) SUPPORT OF EXCEPTIONS TO THE
14) SUPPLEMENTAL DECISION OF
15) ADMINISTRATIVE LAW JUDGE JAY
16) R. POLLACK
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28)
MACHINISTS DISTRICT LODGE 190,)
MACHINISTS AUTOMOTIVE LOCAL 1101,)
INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPECE)
WORKERS OF AMERICA, AFL-CIO)
Charging Party.)

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1 The Charging Party joins in the exceptions and support of exceptions of the General
2 Counsel. In addition, the Charging Party hereby submits the following in support of its exceptions
3 to the Supplemental Decision of the Administrative Law Judge.

4 **A. CREDIBILITY OF ZAHERI AND THE THREAT OF FACILITY CLOSURE**

5 Although the ALJ discredits Mr. Zaheri in the original decision and finds Mr. Zaheri's
6 coercive questions of the employees following a pizza meeting to be in violation of the Act,
7 without further analysis or explanation, the ALJ has credited Zaheri and discredited Lane.

8 On the other hand, Lane's testimony has been credited in all other instances. In finding the
9 threat of closure by Garcia, Lane's testimony was credited.

10 In contrast, Zaheri's statements after the pizza meeting were found not only to be coercive
11 but also created an impression of surveillance. The statements by Zaheri to Lane were made in the
12 context of threats of closure made by company representative Garcia.

13 Lane's testimony was overwhelmingly credited and Zaheri's testimony was discredited.
14 The Charging Party takes exception to the ALJ's finding that Zaheri did not engage in a separate
15 violation of 8(a)(1) during the May 11 meeting when he made his threat of closure. The finding of
16 the ALJ on this matter was not explained.

17 **B. THE ILLEGAL DISCHARGE OF PATRICK ROCHA**

18 The Board remanded the issue of whether Rocha's discharge violated section 8(a)(3). On
19 pages 2-3 of the supplemental decision the ALJ finds the discharge was not in violation of the Act
20 and was based on productivity issues. The ALJ fails to weigh all of the relevant evidence as
21 directed by the Board. The evidence shows Rocha was fired 2 days after his known attendance at a
22 union meeting. He would, on occasion and with notice to his supervisor, leave early. In a flat rate
23 shop, an employee is not paid on the hours actually worked but rather is paid per project or repair
24 and is incentivized to do each piece of assigned work as quickly as possible. Thus, absence from
25 work is not the same type of attendance problem in a flat rate shop as it is for other hourly
26 employees. Further, the record supports a finding that Rocha was working the appropriate hours
27 to complete all work that was being assigned to him and was average in his productivity. (tr. 1067-

74.).

Claims of low-productivity and attendance problems are pretextual and not supported by testimony or documentary evidence. Verification of evidence through electronic date stamping was not conducted and there is no reason to believe the document relied upon by the ALJ is accurate or was contemporaneously produced. Despite these failures, the ALJ credits Garcia rather than Rocha.

Garcia is a known bad actor whose prior testimony has been discredited and has been found to have violated the Act in at least 6 other instances by creating an impression of surveillance, threatening employees Higgins and Baybayan, threatening and interrogating employees Blanco, Lane, and Seefeld. Despite the overwhelming lack of credibility of Garcia's testimony on every other issue, the ALJ inexplicably credits Garcia over Rocha in the events leading up to Rocha's discharge. This is not warranted given the shifting justifications provided by the company and the differences in timelines in the company's pre-trial and trial statements.

The discharge of Rocha was a violation of section 8(a)(3) was effectuated to punish Rocha and send a warning to the remaining bargaining unit employees of the perils of organizing.

C. THE NEED FOR A *GISSEL* BARGAINING ORDER TO REMEDY THE HALLMARK VIOLATIONS

Not only are there numerous 8(a)(1) violations including the hallmark violation of threat of closure already on the record to support a *Gissel* bargaining order, but the exceptions above provide a retaliatory discharge and an additional threat of closure by the owner of the company. Even without a finding of the threat of closure by Zaheri and the illegal discharge of Rocha, the facts warrant the issuance of a bargaining order.¹

In this case, more than half of the employees in the small bargaining unit were subject to direct threats, impressions of surveillance and interrogation. The illegal actions were carried out by the direct supervisors of the bargaining unit employees and the company owner. As a

¹ Mr. Zaheri's direct involvement of many actions in violation of 8(a)(5) supports the need for his personal involvement in the remedy. As a counter-balance to Zaheri's threats directly made to the employees, he should be required to read the remedial notice to the employees. Such a reading would serve as a clear cause and effect between the illegal action and the remedy.

1 bargaining order should have issued, the unilateral change of working conditions and the failure to
2 provide requested information for bargaining are violations of section 8(a)(5).

3 **D. CONCLUSION**

4 Based on the above and exceptions of the General Counsel, the Charging Party seeks
5 appropriate remedies as reflected in the Exceptions, including a *Gissel* bargaining order, the return
6 of Mr. Rocha to work with backpay and interest, and a reading by company officials to the
7 employees.

8 Dated: August 26, 2009

9 WEINBERG, ROGER & ROSENFELD
10 A Professional Corporation

11 By: /s/ Caren P. Sencer
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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 26, 2009, I served upon the following parties in this action:

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*E-Filed

copies of the document(s) described as:

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE JAY R.
POLLACK

[X] BY MAIL I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[X] BY FACSIMILE I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on August 26, 2009.

/s/ Jennifer Koffler
Jennifer Koffler